IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1844

UNITED STATES,

Petitioner,

v.

EUGENE LOVASCO, SR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether a defendant who seeks the dismissal of criminal charges under the Fifth Amendment Due Process clause because of pre-accusation delay may either show that the delay impaired his ability to defend against the charges, or that the government sought the delay to secure an improper tactical advantage.

2. Whether a District Court should reserve ruling on a due process claim based upon pre-accusation delay, and alleging prejudice, until after trial.

STATEMENT

In accordance with Supreme Court Rule 40(3), respondent supplies facts here that are necessary in correcting certain inaccuracies or omissions of the statement of the case supplied by the government.

The government states in its brief that the record reflects that the government stipulated that the investigation of the thefts continued after September, 1973 (Brief, p. 3). The record actually reflects the following stipulation made by respondent's counsel:

> [T]hat since the statement was taken on September 26, 1973, that the only additional work the—the only additional witness the Government had was in January, 1975, a witness who allegedly was offered the purchase of a gun and that said purchase did not take place. (A. 9).

This additional evidence of a sale of a pistol was received on March 6, 1975 (A. 19). The United States Attorney stipulated that he had already scheduled the presentment to the grand jury of his evidence against respondent on March 6, 1975, and received the additional information after the grand jury proceeding (A. 19).

The following record and stipulation by the government was made (A. 19):

> Q. (Mr. Gilden) Now, would it be fair to say, Mr. Wellner,[1] that without this evidence that you would received in March of '75 you would have still recommended the prosecution of the matter and presentation to the Grand Jury? . . . .
>
> Mr. Coughlin: Your Honor, I might stipulate to this. The matter was on the docket for the Grand Jury before we received this information. We were going to the Grand Jury without that information.
>
> The Court: In March?

[1] G.P. Wellner, the Postal Inspector.

> Mr. Coughlin: In March, I received the information the morning of the Grand Jury itself; therefore we had gone to the Grand Jury. (A. 19).

Contrary to the unsupported statement of the government that investigation of the thefts continued, the only evidence supplied to the District Court was Wellner's testimony that he talked to Coughlin and Adelman of the United States Attorney's office on four or five occasions (A. 20). There is no evidence to show whether some of these conversations were before the Investigative Report of October 2, 1973, and further there is no evidence supplied by the government as to the substance of these conversations.[2] Wellner did testify that he did not supply any written supplemental material to the United States Attorney after the report of October 2, 1973 (A. 19).

The government acknowledges that there were no witnesses found after September 26, 1973, as to the matters in the Postal Inspector's report (D. Exh. A, A. 21-26; A. 9-10). The Postal Inspector's report dated October 2, 1973, names respondent as the offender, as well as the nature of the offense, the possession of eight stolen handguns,[3] and reflects that on September 26, 1973, respondent gave his statement to the government. He stated that he visited his son at the mail facility of the Terminal Railroad Association, and after the visit, he returned to his unlocked automobile, where he found a sack of four or five Browning pistols,

[2] One may hypothesize that the conversations were calls by Wellner to the United States Attorneys requesting them to hurry up and prosecute respondent, since respondent had been calling him showing anxiety as to what was going to happen to him (A. 18).

[3] The same 8 handguns in the indictment. Count I and Count II each refer to possession of one pistol, and Count III refers to possession of the remaining 6 pistols.

apparently placed there by an unknown person during his visit. He admitted that he kept the pistols for a few days and then sold them to Boaz, but denied the sale of all eight pistols to Boaz (A. 24).

Respondent testified at the pre-trial hearing on the Motion to Dismiss the Indictment that since September 26, 1973, two witnesses died. One was a Tom Stewart, who died about six months before the hearing on the Motion on April 25, 1975, which would be abou. November, 1974, or better than a year after th. completion of the investigation, and the other was his brother, Tom Lovasco, who died of cancer in April, 1974, or about seven months after the completion of the investigation (A. 11).

Tom Stewart was a switchman, and although the government states he would not have had access to insured mail parcels in the normal course of his duties (Brief, p. 6, n. 6), there is no evidence to support this allegation. The report of the Postal Inspector merely states that respondent would not have access to the involved insured parcels in the normal course of his duties as a switchman.

Respondent testified that he obtained two or three of the guns for Boaz from Stewart, and that he didn't tell Inspector Wellner that he obtained the guns from Stewart because this guy [Stewart] was a bad tomato, for he was liable to take a shot at him if he told the Inspector (A. 13).

Respondent also testified that his deceased brother, Tom Lovasco, was employed by Florissant Dodge, the same employer of Joe Boaz. That his brother, who introduced him to Boaz, was present during all of the gun transactions (A. 11).

Thus, it is apparent that Stewart, had he been alive, would have testified that respondent was not told by him of the source of the guns he provided to

respondent, and thus corroborate respondent's testimony that he did not know the guns were stolen. Further, the brother, if alive, could testify as to all of the transactions with Boaz, which would establish the nature and the number of transactions.

The United States Attorney told the District Judge that the government theorized that the guns came from respondent's son (A. 13). Respondent denied that he had obtained any of the guns from his son (A. 13). Respondent testified that he was told by a Federal agent at the time that he gave his statement that he was protecting his son. A discussion ensued between the agent and respondent about protecting one's son, and respondent stated that if his son was in trouble, he would protect him. Respondent's son gave a statement to the Mail Inspector on September 26, 1973, as well, in which he denied any responsibility for the theft of the parcels (A. 24). In fact, the Inspector's report stated there was no evidence at the time of the report that the son was responsible for the depredations.

The Postal Inspector acknowledged that respondent called him after submission of his report on approximately five to six occasions and expressed concern as what was going to happen to him (A. 16, 18).

The government produced no evidence at the hearing or in the report reflecting that the investigation continued, or in any way incriminated respondent's son.

On October 8, 1975, the District Judge dismissed the four Counts of the Indictment and held that as of September 26, 1973, and in any event, no later than October 2, 1973, the government had all of the information relating to respondent's alleged commission of the offenses charged against him, but did not charge respondent or present the matter to the grand jury until more than 17 months thereafter on March 6, 1975. The Court held that defendant was prejudiced as a result of

the death of Tom Stewart, a material witness in his behalf, and that the government's delay had not been explained or justified and that it was unnecessary and unreasonable (Pet. App. 14).

On February 26, 1976, a divided panel of the Eighth Circuit, consisting of Justice Clark and Judge Bright affirmed the dismissal of three of the Courts relating to possession of stolen mail matter, but reinstated Count IV relating to dealing in firearms without a license.

The majority of the divided panel agreed with the District Judge, and held that the delay was unreasonable and there was prejudice to respondent's ability to defend against the charges. That respondent had been prejudiced by reason of the death of Tom Stewart, a material witness on his behalf.

The Appeals Court rested its decision on *United States v. Jackson*, 504 F.2d 337 (8th Cir. 1974), which based its decision on *United States v. Marion*, 404 U.S. 307 (1971), that unreasonable pre-accusation delay, coupled with prejudice to the respondent, may violate the Fifth Amendment.

It is to be noted that the Appeals Court opinion includes the government's contention that the delay in the prosecution resulted from awaiting results of further investigation, which might have implicated the person or persons who may have stolen the mailed matter (Pet. App. 4a). The Court's opinion, thus, incorporated the theory of the case set out by Coughlin, the United States Attorney, in the District Court, and attempts to give the government some reason for the delay, although there was no evidence presented in the record of the District Court to support the government's position.

SUMMARY OF ARGUMENT

I

The criteria for proving a violation of the Fifth Amendment Due Process Clause under *United States v. Marion, supra,* is either that there was unreasonable pre-accusation delay coupled with prejudice to the defendant's rights to a fair trial, or that the delay was an intentional device by the government to gain a tactical advantage over the accused. The Eighth Circuit's decision here is totally in accord with this Court's ruling in *United States v. Marion, supra.*

A. The Eighth Circuit found that the government had all of the information relating to the commission of the offenses no later than October 2, 1973, that the government did not present the matter to the grand jury until more than seventeen months later, that respondent was prejudiced in his defense against the charges by the death of a material witness, and that the government did not explain or justify its delay. The government has not raised any question about these findings to this Court. These uncontested findings should establish a Fifth Amendment Due Process claim for pre-accusation delay under *United States v. Marion*. In fact, the government conceded in its brief before the Eighth Circuit that pre-indictment delay may be the basis for dismissal of an indictment if the delay was unreasonable and the defendant shows sufficient prejudice as to be a due process violation.

B. The government's position here that respondent must prove that the delay was an intentional device to gain a tactical advantage as part of a Fifth Amendment Due Process claim based on pre-accusation delay is an impossible burden of proof for a defendant.

Where the respondent proved pre-accusation delay and actual prejudice which would impede a fair trial,

and the government made no effort to explain or justify its delay, this should satisfy the criteria for establishing a Fifth Amendment Due Process claim. Where the government completed its case on October 2, 1973, and did nothing further for seventeen months, this was a deliberate and avoidable choice, and if there is resultant material prejudice to the defendant because of this delay, this prejudice was foreseeable to the government, and should be the basis for the dismissal of an indictment on Fifth Amendment Due Process grounds.

C. The District Court has the inherent discretionary power from the common law to dismiss a case for want of prosecution. Since the government presented no evidence to justify, explain or show any necessity for its lengthy delay, and since there was resultant material prejudice to respondent, the District Judge's discretionary power to dismiss should not be interfered with.

D. The standards of *Barker v. Wingo*, 407 U.S. 514 (1972) may be used as guides in determining actual prejudice in a pre-accusation delay Fifth Amendment Due Process claim. There is no necessity to prove bad faith in order to have a violation of due process, and this would obviate the need to show prosecutorial overreach, which requirement is argued by the government.

The actual prejudice, which was proven, was the death of a witness Tom Stewart, who could have testified that respondent did not know that certain guns were stolen, a vital element of proof necessary to establish guilt under the three Counts dismissed by the Appeals Court. The death of the witness occurred about one year after the completion of the investigation, and he would have been available to testify at an early trial. In addition, the government through its seventeen

months of inertia had to anticipate that there would be a high probability of prejudice.

The government's policy argument, that a continuing investigation benefits the person suspected and society generally, is not supported by the facts here for the government presented no evidence to justify or explain its delay, and all of the evidence the government had on October 2, 1973, to indict respondent was the same evidence presented to the grand jury in March, 1975.

E. 1. Based on the government's actions which it has candidly characterized as simple inertia, respondent has lost vital material evidence which would affect the outcome of a trial. Many cases decided by this Court support that the loss of evidence that would insure a fair trial to a defendant would be the basis of a due process claim where the loss of evidence occurred through the fault of the government.

The government's argument that the Court of Appeals' decision interferes with the functioning of the grand jury does not fit the facts here, for the United States Attorney had no new evidence to present to the grand jury in March, 1975, other than the report of October 2, 1973.

2. The Statute of Limitations does not fully define respondent's rights where a Fifth Amendment Due Process claim is made for pre-accusation delay. The limitations question cannot foreclose a Fifth Amendment attack, and requires the District Court to assess on a case by case basis the delicate judgment that requires defendant have a fair trial.

3. The government argues against an ad hoc approach to pre-accusation delay where there has not been prosecutorial overreach, since there would be a need to ascertain at what point the government delayed formal accusation.

The District Court found that no later than October 2, 1973, the government had all of the information relating to the alleged commission of the offenses. There was no reason or excuse given by the government for the delay. Thus, on the facts here the government had the evidence for probable cause to prosecute respondent as of October 2, 1973. An early prosecution would have enabled respondent to adequately prepare his defense.

This case establishes a classic example of prosecutorial inaction with resultant prejudice. The issue of a Fifth Amendment Due Process claim based on pre-accusation delay must be made on an ad hoc basis.

II

The government argues that the hearing on the Motion to Dismiss based on the pre-accusation delay and prejudice should await the outcome of the trial. The government never made this request to the District Court, and the government's "question" here actually represents a request for an advisory opinion.

The hearing before the District Court here took a very short time. The issues were narrowly confined to delay and prejudice. Thus, the government's claim that the pre-trial Motion is a dress rehearsal for the trial has no merit.

The denial of a fair trial in view of prejudice, economy of money to the defendant and economy of time to the Court would demand that this Motion be taken up before trial. Further, the House Committee on the Judiciary stated Courts should be discouraged from ruling on pre-trial Motions until after verdict. The District Judge committed no error in deciding this Motion prior to trial.

ARGUMENT

I

A DEFENDANT SEEKING THE DISMISSAL OF CRIMINAL CHARGES UNDER THE FIFTH AMENDMENT DUE PROCESS CLAUSE BECAUSE OF PRE-ACCUSATION DELAY MAY EITHER SHOW THAT THE DELAY IMPAIRED HIS ABILITY TO DEFEND AGAINST THE CHARGES, OR THAT THE GOVERNMENT SOUGHT THE DELAY TO SECURE AN IMPROPER TACTICAL ADVANTAGE.

A. The decision of *United States v. Marion*, requires that the defendant prove actual prejudice by reason of the pre-accusation delay in order to have an indictment dismissed and this requirement has been satisfied here by the death of a material witness during a 17 month unexplained delay.

United States v. Marion, supra, appears to be misconstrued by the government, when it alleged that the dictates under *Marion* demand the satisfaction of two requirements: that the pre-indictment delay caused substantial prejudice to defendant's rights to a fair trial and that the delay was an intentional device by the government to gain a tactical advantage over the accused.[4]

[4] The government's position that the defendant must show that the delay was an intentional device to gain a tactical advantage over the accused to constitute a Fifth Amendment violation is raised for the first time before this Court.

In fact, the government conceded in its brief before the Eighth Circuit:

> Such a delay (pre-indictment) may be the basis for dismissal of an indictment if the delay was unreasonable and the defendant shows sufficient prejudice as to be a due process violation. (P. 3 of Brief).

This is in accord with respondent's position, and is now rejected by the government before this Court.

This Court commented favorably on the government's concession that if these two elements were present, that due process of the Fifth Amendment would require dismissal of the indictment. However, this Court went further, and stated that it would not spell out when and in what circumstances actual prejudice resulting from pre-accusation delay would require a dismissal of the prosecution.[5]

This Court in *Marion* further stated:

> To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily *involve a delicate judgment* based on the circumstance of each case. It would be unwise at this juncture to attempt to forecast our decision in such cases. (at p. 325). (Emphasis supplied).

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[5] See Comment, *The Speedy Trial Guaranty: Criteria and Confusion in Interpreting its Violation*, 22 DePaul Law Review 839, 863 n. 164 (1973):

> It is not clear whether both of these factors need be present for a violation of due process to be recognized. The *Marion* Court in citing these two merely recognized that the government in its brief had conceded that where both were present, then a fifth amendment due process violation would appear. Brief for the Government at 26-27, United States v. Marion, 404 U.S. 307 (1971). Therefore, the mere presence of one of these factors may be enough to show a violation of the fifth amendment. Cf. United States v. Daley, 454 F.2d 505, 508 (1st Cir. 1972), where the court stated: "[s]ince neither actual prejudice *nor* purposeful governmental delay has been shown, the *pre-indictment* time lapse is irrelevant . . . ." (emphasis added) . . . In both the *Marion* and *Barker* cases the delay was an "intentional (tactical device" used by the government to strengthen its case and gain an advantage ov the defendant, however, in neither case did the defendant prove actual prejudice (Marion did not plead actual bu merely "possible" prejudice). Thus, if these two factors are to be considered, or one alone, it appears the showing of actual prejudice, with the burden being on he who pleads it, will be the prime requirement to show a fifth amendment due process violation.

As far as appellees in *Marion, supra,* were concerned, this Court held their prejudice claims were elements present whether before or after arrest, to wit: memories will dim, witnesses become inaccessible, and evidence be lost (*Marion*, at pps. 321, 325). However, this Court refused to accept these possibilities or speculation as a denial of a fair trial to justify a dismissal of the indictment in view of the Statute of Limitations.

This Court then stated that actual prejudice may arise at the trial, which would give rise to a due process claim, but at this time, the due process claims based on the record before the Court were speculative and premature (*Marion*, at p. 326).

Thus, this Court implicitly stated that actual prejudice could be the basis of a due process claim. The other element, the government's delay to gain a tactical advantage over the accused, may represent an alternate ground for demonstrating a violation of due process to justify a dismissal of the indictment.

If there is to be a due process right against unreasonable pre-arrest delays, it would not seem logical to limit the right to intentional delays. It is the delay itself, not its source, which impairs the accused's ability to defend himself.[6]

The government here has not questioned the essential findings of the District Judge and the Appeals Court:

1. that the government had all of the information relating to the commission of the offenses no later than October 2, 1973;
2. the government did not charge or present the matter to the grand jury until more than 17 months thereafter, and that as a result of the delay, respondent has been prejudiced by reason of the death of Tom Stewart, a material witness

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[6] Note, *Constitutional Limits on Pre-Arrest Delay*, 51 Iowa Law Review 670, 680 (1966).

on his behalf, and thus respondent has been prejudiced as to his ability to defend against the charges; and

3. the government's delay has not been explained or justified and is unnecessary and unreasonable.

The government argues here that the majority of the panel acknowledged that the delay had been occasioned by the government's desire to identify additional persons who may have participated in the thefts. This dictum in the Appeals Court decision came about in oral argument before the Appeals Court:

> The prosecuting attorney has indicated that the Government theorized that the guns in question had come from the accused's son, who worked at the post office, but no charges have been made against him. At oral argument the prosecutor indicated the delay in the prosecution resulted from awaiting results of further investigation which might have implicated the person or persons who may have stolen the mailed matter. *United States v. Lovasco*, 532 F.2d 59, 61 (8th Cir. 1976).

and is not supported by any testimony in the record.

A more plausible hypothesis may be drawn from the record. That respondent's anxiety and his telephone calls to the Inspector inspired calls from Wellner to the United States Attorneys requesting that they should expedite the proceedings against respondent. This analysis can be more readily drawn from the record than the attempt by the government to excuse its conduct by making unsupported statements as a basis for the delay, and thus express a virtuous reason for its delay. It is to be noted that the Postal Inspector's Report, (D. Exh. A), stated that there was no evidence at that time that the son was responsible for the thefts.

The findings of prejudice to respondent's ability to defend against the charges, and unjustified, unnecessary

and unreasonable delay by the government are the very elements that this Court in *Marion* approved as actual prejudice and which *Marion* suggested should be shown at trial. There is no speculation or potential prejudice here, but demonstrated facts to support the findings of the lower Courts, which the government has not questioned here, but were attacked by the government in a footnote (Brief, p. 45 n. 37).

Thus, under the standards of *Marion*, this Court should agree that the Appeals Court was correct in dismissing the three Counts of the indictment relating to possession.

B. Where the defendant has shown actual prejudice including unreasonable, unexplained and unjustified delay, there is no need to prove that the government used the delay as a device to gain a tactical advantage over the respondent.

The government argues that respondent failed to show that the delay was an intentional device to gain a tactical advantage over him; however, the government has failed to show any justification for its failure to prosecute defendant after defendant showed actual prejudice.

In *United States v. Finkelstein*, 526 F.2d 517, 526 (2nd Cir. 1975), the government showed justification for its action although a showing of actual prejudice was made by the defendant. Here no such showing was made.[7]

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[7] In *United States v. Churchill*, 483 F.2d 268, 275 (1st Cir. 1973), Chief Judge Coffin in a concurring opinion stated:

> In the past we have not adopted the approach of some other courts in shifting the burden of proof as to prejudice from delay, *see, e.g.*, United States v. Rucker, 150 U.S.App.D.C. 314, 464 F.2d 823 (1972). I hesitate to

(continued)

The government wants to eliminate all review of its decisions, by requiring the defendant to prove that the government delayed prosecution in order to gain a tactical advantage for a violation of due process. The government concedes nothing by this for it would be impossible to obtain this proof.[8] Most, if not all government agents, United States Attorneys or Department of Justice lawyers would be hardpressed to admit that they sat back knowing that the defense would be impaired by the delay.

(footnote continued from preceding page)

recommend an arbitrary time limit which would trigger a shifting from a defendant to the government. But it seems to me that where the government is responsible for the deliberate tactical delay in the formal institution of criminal proceedings for almost the entire limitations period, without notice to the accused, we would well be justified in imposing on the government the burden of proving the absence of prejudice, difficult though that burden may be to sustain.

[8] Government employees are the only persons who are likely to have firsthand knowledge on the issue (bad faith on the part of the government), and they may be reluctant to testify as to that knowledge. Since the facts surrounding a delay will seldom be so clear that they permit an inference of bad faith intent on the part of the government, the defendant cannot prove the requisite material element by any means other than such testimony. . . . . .
Even if he is permitted to discover police documents, many facts within the knowledge of the government may never have been put on paper. And the discovery of police documents will not be of assistance in those cases in which the prosecuting attorney is responsible for the delay. The defendant will still be forced to rely upon potentially hostile government witnesses to sustain his burden of proof. Finally, if the cause of the delay is not readily apparent, the defendant will be forced to prove a negative proposition–that no good cause for the delay could possibly exist. For these reasons, the defendant should merely have to allege that there has been an unexplained delay. The government will then have to come forward with evidence showing that a delay was permissible. Note, *The Right to Speedy Trial,* 20 Stanford Law Review 476, 502, 503 (1968).

Thus, the concession by the government is of token value, and offers nothing to insure a fair trial due to prejudicial actions taken by the government.

It is apparent that there must be accountability by the prosecutor for his acts of delay which created prejudice. This appears to be the only way now to force the prosecutor to justify his actions, and to have his acts reviewed by the Courts.[9]

In *United States v. Mandujano,* ____ U.S. ____, 48 L.Ed.2d 212, 233 (1976), Justice Brennan, in a concurring opinion, discusses prosecutorial abuse and states:

> There can be no doubt that sanctioning unfettered discretion in prosecutors to delay the seeking of criminal indictments pending the calling of criminal suspects before grand juries to be interrogated under conditions of judicial compulsion runs the grave risk of allowing "the prosecution [to] evade its own constitutional restrictions on its power by turning the grand jury into its agent."

Thus, by analogy, the Courts should not sanction unfettered discretion in prosecutors when an abuse of that discretion by prejudicial delay without reason subverts the requirement of fundamental fairness in a criminal jury trial.[10]

The government delayed arresting defendant against whom its case was complete. In such a situation, the government has made a deliberate choice for a supposed advantage. This was a deliberate and avoidable choice on the part of the law-enforcement authorities.[11]

[9] See *Discretionary Justice Preliminary Inquiry,* Kenneth Culp Davis, 1969, pps. 209-214.

[10] *Cf. Hampton v. United States,* 425 U.S. 484, 494 n. 6 (1976), (J. Powell concurring).

[11] See Note, *The Right to a Speedy Trial,* 20 Stanford Law Review 476, 489 (1968).

C. The district court has the inherent discretionary power derived from the common law to dismiss a case for want of prosecution where respondent has been prejudiced to the extent that he cannot have a fair trial, and the government gives no necessity, justification or explanation for its delay.

The government has not touched on the right of the District Judge to dismiss a case for want of prosecution in its brief.

In *United States v. Furey*, 514 F.2d 1098, 1103 (2nd Cir. 1975), the Appeals Court discusses the power of a Federal Court to dismiss a case for want of prosecution whether or not there has been a Sixth Amendment violation, and that this power has been derived from the common law.

The Appeals Court reviews the cases that support this proposition and states that this power is independent of Sixth Amendment considerations; that it is an outgrowth of the Court's supervisory authority with respect to its own jurisdiction; and an exercise that has traditionally been within the Court's discretion.[12]

Further, Judge Heaney stated in his dissent in *United States v. Quinn*, 540 F.2d 357, 363 (8th Cir. 1976):

[12] *Mann v. United States*, 113 U.S.App.D.C. 27, 304 F.2d 394, *cert. denied*, 371 U.S. 896, 83 S.Ct. 194, 9 L.Ed.2d 127 (1962); *District of Columbia v. Weams*, 208 A.2d 617 (D.C.Mun.App. 1965); *Ex parte Altman*, 34 F.Supp. 106 (S.D.Cal. 1940); *cf. United States v. Cartano*, 420 F.2d 362, 363 (1st Cir. 1969), *cert. denied*, 397 U.S. 1054, 90 S.Ct. 1398, 25 L.Ed.2d 671 (1970); *Mathies v. United States*, 126 U.S.App.D.C. 98, 374 F.2d 312, 314-15 (1967). Restated in Rule 48(b), F.R.Cr.P., see Advisory Committee Notes to Rule 48, 8A Moore's Federal Practice ¶48.01.

Also see: Note, *Justice Overdue – Speedy Trial for the Potential Defendant*, 5 Stanford Law Review 95, 104 (1952).

> The discretionary authority is broadly described. The cited cases[13] present factually the post-arrest situation, but the Court's authority over its jurisdiction is not so limited. Reason dictates this conclusion. Judicial concern for the preservation of proof, the maximization of the deterrent effect of prosecution, the minimization of potential additional criminal conduct and the sure arrest of the individual apply no less forcefully to the pre-arrest situation. The Supreme Court has not indicated otherwise.

In *Nardone v. United States*, 308 U.S. 338 (1939) Mr. Justice Frankfurter stated at pps. 341-342:

> Dispatch in the trial of criminal causes is essential in bringing crime to book.... The civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted to the judge presiding in federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal, in ruling upon preliminary questions of fact. Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges.

The government has not appealed from the findings of the Appeals Court that there was unjustified, unnecessary and unreasonable delay, and prejudice to respondent's ability to defend against the charges.

The District Judge dismissed a case in which there was a want of prosecution. As the record reflects, there was no attempt by the government to justify its actions. Thus, the District Judge rightfully used his discretionary power where there was a denial to

[13] *United States v. Furey, supra; United States v. McWilliams*, 163 F.2d 695, 696 (D.C.Cir. 1947); *Ex Parte Altman, supra; District of Columbia v. Weams, supra.*

respondent of a fair trial, and where the government did not explain or justify its action.

The District Judge's discretionary power should not be interfered with here based on the record made by respondent, and the lack or avoidance of a record made by the government. The District Judge's good sense and fairness was reflected in his dismissal of the indictment.

D. Respondent has proven the actual prejudice that denied him a fair trial. Further, the government could have predicted that seventeen months of inertia would have had this result.

The government argues that the Appeals Court below has confused the standards for a Sixth Amendment violation under *Barker v. Wingo*, 407 U.S. 514 (1972) with the standards under *United States v. Marion*, *supra*, for a Fifth Amendment Due Process claim.

Barker, *supra*, instructs that "a balancing test necessarily compels Courts to approach speedy trial cases on an *ad hoc* basis"; that there are four factors to be considered in assessing whether a defendant has been deprived of his Sixth Amendment Right: length of delay, the reason for the delay, the defendant's assertion of his right and prejudice to the defendant (at p. 530). *Barker* does not say that all these factors must be present to establish a Sixth Amendment violation; they are some of the factors to be considered.

There is nothing in *Barker* that limits these factors for consideration only to Sixth Amendment violations, nor that prevents them from being considered as actual prejudice under a Due Process claim for pre-accusation delay.

This Court referred to *Brady v. Maryland*, 373 U.S. 83 (1963) as precedent in *Marion*, *supra*, on the Fifth

Amendment discussion (*Marion*, at p. 324), and in *Brady*, this Court held that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the *good faith or bad faith of the prosecution* (at p. 87).[14]

Thus, prosecutorial overreach is not mandated when there has been proof of actual prejudice.

This Court has also alluded to a number of Court of Appeals cases that have touched the due process question in determining when and in what circumstances delays causing actual prejudice required the dismissal of the prosecution.[15]

Here, the District Judge as well as the Appeals Court held that the loss of the evidence of Tom Stewart, who died and who could have testified that respondent did not know that certain guns were stolen from the United States mails, was prejudicial to respondent (Pet. App. 5a). This evidence was vital for respondent since the

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[14] Also see *United States v. Agurs*, ____ U.S. ____, U.S.L.W. 5013, 5015 (1976).

[15] *United States v. Marion*, *supra*, at p. 324, n. 17, citing the following cases: *Benson v. United States*, 402 F.2d 576, 580 (9th Cir. 1968); *Schlinsky v. United States*, 379 F.2d 735, 737 (1st Cir. 1967); *United States v. Capaldo*, 402 F.2d 821, 823 (2nd Cir. 1968); *United States v. Lee*, 413 F.2d 910, 913 (7th Cir. 1969); *United States v. Wilson*, 342 F.2d 782, 783 (2nd Cir. 1965); *United States v. Harbin*, 377 F.2d 78, 80 (4th Cir. 1967); *Acree v. United States*, 418 F.2d 427, 430 (10th Cir. 1969); *Nickens v. United States*, 323 F.2d 808, 810 n. 2 (D.C.Cir. 1963).

In *United States v. Wilson*, *supra*, the Appeals Court gives alternative grounds for prejudice as expressed in *Marion*, *supra*, on p. 783, that there must be a showing that the delay in obtaining the arrest warrant was prejudicial or part of a deliberate, purposeful and oppressive design for delay.

knowledge that the guns were stolen is essential to establish guilt under 18 U.S.C. §1708.[16] This Court in *Barker* held that if witnesses die or disappear during a delay, the prejudice is obvious (*Barker*, at p. 532). Here, there is no idle speculation of a violation of the Fifth Amendment. If trial commenced promptly, Tom Stewart would have been alive to testify to matters that could acquit respondent. Thus, the prejudice caused by the delay was clear.

The government adopts Judge Henley's hypothesis in his dissent, that the name Stewart seems to have come up for the first time when the respondent testified in support of the Motion. Judge Henley stated that one may suspect that this claim of prejudice on the death of Stewart was nothing but a fabrication. This is certainly a novel concept, for there is no apparent law that requires the defendant to signal his testimony before the pre-trial hearing, as well as at the criminal proceeding. If the government had any doubt about this testimony of the deaths, they never expressed it to the District Judge, nor did they ask for a continuance of the pre-trial proceeding to make further inquiry as to this testimony and its materiality. The Appeals Court majority opinion states that the government concedes that Tom Stewart did exist and was employed by the Terminal Railroad (Pet. App. 5a).

Further, the government argues policy to this Court, that during delay additional facts may come to light to show that the person under suspicion was not actually involved, or that additional facts may be necessary to prove guilt to a jury, or additional facts may be received to implicate additional people in the crime.

[16]It is to be noted that another witness died in the interim, respondent's brother, who witnessed all of the transactions between Boaz and respondent. No mention is made by either the District Court or the Appeals Court about the prejudice due to the loss of this testimony due to prosecutorial delay.

That further delay according to the government benefits potential defendants. This is speculation on the part of the government, and cannot be extracted from the facts in this case.

In *Woody v. United States*, 370 F.2d 214 (D.C. Cir 1966) the majority opinion sets forth an answer to the policy statement of the government. Judge Bazelon stated that delays prior to arrest which hinder or prevent presentation of a defense shackle our system of determining truth through the adversary process (at p. 216).

Chief Justice Burger dissented in *Woody*, in which there was a death of a witness three and one-half months after the alleged offense, but as Justice Burger stated, the witness would have been dead at time of trial and the witness' testimony merely represented a "slender hope" (at p. 223). This case does not rest on "slender hopes and judicial speculation". Here, Tom Stewart, who died more than a year after the completion of the investigation, would certainly have been available for the trial, and this would satisfy the nexus between the delay and the death (*Woody*, at p. 223).

Justice Burger in *Woody* held that a defendant can prevail if he can show sufficient prejudice (at p. 222). Further, Justice Burger's dissent which weighs the length of delay with the quantum of proof for prejudice appears to be in accord with the Eighth Circuit's decision in *United States v. Naftalin*, 534 F.2d 770, 773 (8th Cir. 1976), as the delay increases, the specificity with which prejudice must appear diminishes. (In an identification case).

The government further argues that there must be a breach of a duty owed by the government in order to trigger a Fifth Amendment violation; that since respondent did not prove prosecutorial overreach the

events here were fortuitous (Brief, p. 29).[17] The government also argues that it has the right to delay accusation due to "simple inertia" (Brief, p. 20).

This laissez-faire attitude, fortuity and simple inertia, is not what due process demands after the completion of the investigation.

As a result of the government's carelessness it owes a duty to respondent to anticipate through its "inertia" that evidence may be lost to the defendant to trigger a Fifth Amendment violation.[18]

In *Estes v. State of Texas*, 381 U.S. 532, 542, 543 (1965) this Court stated:

> Nevertheless, at times a procedure employed by the State involves such a probability that prejudice

[17]Interestingly, the government has apparently changed its position here from its position in *Marion*. In *Marion*, the government conceded that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if delay caused substantial prejudice and the delay was an intentional device to gain a tactical advantage over the accused. In Brief, p. 29 fn. 21 the government changes its position to one claiming that the remedy for a *Brady* violation is the award of a new trial not the bar of adjudication of the charges. Actually, an award of a new trial would not resolve the basic problem of a fair trial here, for a material witness is not available and respondent has been prejudiced in his criminal trial.

[18]It must be recognized, however, that different cases may present varying fact patterns which would demand varying "grace" periods for the police to finish the business that is essential before an arrest can be made. A more flexible standard may therefore be desirable. Such a standard may be supplied by the tort concept of foreseeability. Under such a test, the court would weigh the facts in each case to determine whether or not it is reasonable for the prosecution to have foreseen that a defendant would have suffered a loss of witnesses, evidence, or memories during the pre-arrest delay period. Note, *Pre-Arrest Delay: Evolving Due Process Standards*, 43 New York Law Review 722, 738 (1968).

> will result that it is deemed inherently lacking in due process. Such a case was In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), where Mr. Justice Black for the Court pointed up with his usual clarity and force:
>
> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* (emphasis in original) of unfairness. * * *
>
> [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13 [99 L.Ed. 11]." At 136, 75 S.Ct. at 625. (Emphasis supplied).

When the government waited seventeen months based on simple inertia it had to anticipate that the defendant would suffer a high probability of prejudice.

E. The government owes a duty to respondent here through its delay and his resultant prejudice, although there is no evidence of prosecutorial overreach, and although he has been indicted within the statutory period. The Due Process Clause of the Fifth Amendment has been triggered here and the Statute of Limitations does not control. This Due Process claim must be considered on an ad hoc basis.

Here, respondent discusses separately:

1. The denial of Due process through the impact of pre-accusation delay and prejudice.
2. The lack of control of the Statute of Limitations on the facts in this case.

3. The duty of the government to prosecute when it has probable cause to do so.

1. The denial of due process through the impact of pre-accusation delay and prejudice.

In the recent case of *United States v. Agurs, supra,* this Court held that a fair analysis of the holding in *Brady, supra,* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial (at p. 5015).

The Appeals Court held that Tom Stewart's testimony was material. His testimony could have proved respondent's innocence. The loss of it prejudiced the respondent's ability to defend against the charges. Thus, under the rule in *Agurs*, the loss of this vital evidence would affect the outcome of his trial. See *Brady v. Maryland, supra.*

The Sixth Amendment demands that the defendant "have compulsory process for obtaining witnesses in his favor", and a fair trial under the Fifth Amendment would demand the defendant's right to present these material witnesses on his behalf.

A series of due process cases have effectively answered the issue the government raises about its duty to respondent for its prejudicial delay.

The government's delay has withdrawn from the defendant an indispensable right, the opportunity to be heard in his defense. *Snyder v. Massachusetts*, 291 U.S. 97, 116 (1934). He has been denied the means of presenting his best defense, and essential fairness is lacking here since he cannot put his case effectively in Court, *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942).

The government's delay has infected the trial and prevented a fair trial, *Lisenba v. California*, 314 U.S.

219, 236 (1941), by denying to respondent the benefit of witnesses. *Burwell v. Alabama*, 287 U.S. 45, 65, (1932).[19]

The crux of due process has been summed up in *Malinski v. People of State of New York*, 324 U.S. 401, 416, 417 (1945) (J. Frankfurter concurring):

> The exact question is whether the criminal proceedings which resulted in his conviction deprived him of the due process of law by which he was constitutionally entitled to have his guilt determined. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.

Also see *Rochin v. California*, 342 U.S. 165, 169 (1952).

Thus, this Court must determine whether the respondent can obtain a fair trial under the Fifth Amendment Due Process Clause without a material witness, the only witness who can corroborate his testimony that he did not know the guns to be stolen.[20]

If this Court rules that although this testimony is material to a fair trial, but that the government can

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[19]See *Petition of Provoo*, 17 F.R.D. 183, 196, 202 (D.C. Md. 1955), *aff'd memo. sub nom, United States v. Provoo*, 350 U.S. 857 (1955).

[20]Due Process demands that defendant's counsel have sufficient time to marshal his evidence, and refuses to permit conviction on the basis of evidence reached by perjured testimony or coerced confessions. By the same reasoning, due process may be denied if defense is required after delay has resulted in loss of evidence or a material reduction in its value. Note, *Justice Overdue–Speedy Trial for the Potential Defendant*, 5 Stanford Law Review 95, 107, 108 (1952).

withhold prosecution, and that there are no controls on this conduct other than the proof of intentional delay, then this Court gives carte blanche to prosecutorial indifference to the rights of a defendant. This Court would also establish a double standard, one that permits, tolerates and condones prosecutorial "inertia", but one that demands that Courts and defendants, once the prosecutor makes up his mind to proceed with indictment, rush to a trial under Statutory and Federal Rule demands.[21] Courts and defendants would thus be subject to the starting gun of the prosecutor.[22]

Judicial supervision of the administration of criminal justice in the Federal Courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. *McNabb v. United States*, 318 U.S. 332, 340 (1943). This adminstration should insure that vague, unsupported claims of the government of good faith, and concern over the rights of a defendant do not outweigh supported claims of a denial of a fair trial. Broad principles have been asserted by the government, but the record must support these principles and that record is lacking here.

Now Chief Justice Burger stated in *Nickens v. United States, supra,* on p. 810, n. 2:

> Although it has not been directly decided, due process may be denied when a formal charge is delayed for an unreasonably oppressive and unjustifiable time after the offense to the prejudice of the accused; a fugitive or one who had concealed his wrongdoing could obviously not claim he was oppressed by delay.

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[21] Rule 50 Federal Rules of Criminal Procedure; 18 U.S.C. §3161-3174.

[22] When there is no formal accusation, however, the State may proceed methodically to build its case while the prospective defendant proceeds to lose his. *United States v. Marion,* at 331 (Douglas J., concurring).

These very elements were the findings of the Eighth Circuit here, unreasonable pre-accusation delay coupled with prejudice.

The government argues that though the federal investigators may believe that their investigation supports probable cause for guilt, this may not necessarily be the United States Attorney's position. However, the evidence here is stronger than the investigator's belief that they had sufficient evidence to present for respondent's guilt. The United States Attorney announced to the District Court that he had scheduled the matter for the grand jury's consideration seventeen months later with apparently no new evidence other than the statement given to him on October 2, 1973, by the Postal Inspector. Thus, the statement of October 2, 1973, in the judgment of the prosecutors did establish probable cause.

If the United States Attorney had come in with evidence that additional witnesses or evidence had been sought, then there may have been another result here. There is no record here of the government's activities subsequent to October 2, 1973. Wellner discussed the case with Coughlin and Adelman of the United States Attorney's office on four or five occasions (A. 20). However, the record is silent as to the time, nature and substance of these discussions. There is no support for the government's statement that it was attempting to get evidence on the son, or others, or possible evidence to free respondent from suspicion. In fact, the investigation report of October 2, 1973, states there was no evidence at the time of the report of any responsibility on the part of respondent's son.

Further, this case does not involve special reasons for delay of an indictment since this does not involve the matter of narcotics, nor is this a complicated case of conspiracy or fraud. This is an individual case of stolen mail matter.

The government's concern for the rights of the defendant by delay is mere rationalization to avoid this Court placing limitations on their conduct.

In *Marion, supra,* this Court set parameters on pre-accusation delay. Therefore, this Court should mandate prompt disposition by the government of completed investigations.

The government has argued that the Appeals Court's construction of due process would interfere in an unwarranted manner with the functioning of the grand jury.

The government also argues that it would have to present matters to the grand jury without complete information, that there would be unwarranted accusation and escape from sanctions by some.

This argument by the government does not deal with the facts here in the record. The United States Attorney conceded that it has scheduled the matter for the grand jury in March, 1975. It had no additional information to present to the grand jury other than the report dated October 2, 1973.

The District Court's finding that

> the evidence disclosed and we find that as of September 26, 1973 and in no event later than October 2, 1973, the Government had all the information relating to defendant's alleged commission of the offense charged against him, but did not charge defendant or present the matter to the grand jury until more than 17 months thereafter. (Pet. App. 14a).

is not challenged by the government.

The government wants this Court to sanction "*simple inertia*" (Brief, p. 20). The public policy arguments that delay is a quest for the truth, does not fit the evidence in this case. Respondent, who was the offender in October, 1973, for possession of stolen mail matter, is

the indicted in March, 1975, based on the same evidence recorded in October, 1973.

Respondent, in fact, kept pushing the Postal Inspector to learn what was going to happen to him. This is not a case where the accused fled. This is a case where the accused gave a statement, and stayed around maintaining contact with the Postal Inspector. No one can complain that the file was forgotten or lost, for the phone calls from respondent to the Postal Inspector kept the facts fresh in the Inspector's mind.

Thus, the argument by the government here that the Court of Appeals' decision interferes in an unwarranted manner with the functioning of the grand jury, is not a conclusion one can make from the record below.

2. The lack of control of the Statute of Limitations on the facts in this case.

The government argues against the requirement that Courts consider timeliness of criminal charges on an ad hoc basis where there is no prosecutorial overreaching and where the charges have been brought within the Statute of Limitations.

The issue of the necessity of proving prosecutorial overreach has been discussed and argued in other points. The matter of the Statute of Limitations where there has been pre-accusation delay and prejudice has been specifically dealt with in *Marion, supra,* on p. 324:

> Nevertheless, since a criminal trial is the likely consequence of our judgment and since appellees may claim prejudice to their defense, it is appropriate to note here *that the Statute of Limitations does not fully define the appellees rights with respect to the events occurring prior to indictment.*[23] (Emphasis supplied).

[23] See Note, *The Right to a Speedy Trial,* 20 Stanford Law Review, 476, 492 (1968).

Further, in *Dickey v. Florida*, 398 U.S. 30, 47 (1970) J. Brennan in a concurring opinion stated:

> We said in *Ewell, supra*, 383 U.S. at 122, 86 S.Ct. at 777, that "the applicable statute of limitations * * * is usually considered the primary guarantee against bringing overly stale criminal charges." Such legislative judgments are clearly entitled to great weight in determining what constitutes unreasonable delay. But for some crimes there is no statute of limitations. None exists, for example, in prosecutions of federal capital offenses, 18 U.S.C. §3281. And, even when there is an applicable statute, its limits are subject to change at the will of the legislature, and they are not necessarily co-extensive with the limits set by the Speedy Trial Clause. Judge Wright, concurring in the result in Nickens v. United States, 116 U.S. App. D.C. 338, 343 n. 4, 323 F.2d 808, 813 n. 4 (1963), observed: "The legislature is free to implement the [speedy-trial] right and to provide protections greater than the constitutional right. But the minimum right of the accused to a speedy trial is preserved by the command of the Sixth Amendment, whatever the terms of the statute." Cf. *Nickens, supra*, at 340 n. 2, 323 F.2d. at 810 n. 2.

The existence of a legislative statute can never foreclose a fundamental constitutional right, and thus it can only be seen as an outer bound and not as forestalling standing to complain of an infringement of the constitutional right which occurs during the time period.[24]

This requires that the District Court assess on a case to case basis that "delicate judgment" that requires the

[24]Comment, *The Speedy Trial Guaranty: Criteria and Confusion in Interpreting Its Violation*, 22 DePaul Law Review, 839, 863 (1973).

defendant have a right to a fair trial, when he alleges actual prejudice caused by the government's pre-accusation delay, although the Statute of Limitations has not run.

The government argues further that under *Hoffa v. United States* 385 U.S. 293 (1966) that there is no constitutional right to be arrested.

There is a distinction here between the issues in *Hoffa* and the fact situation here. Here, there were single criminal transactions with a definite cut-off date of prosecution, and the Postal Inspector had all of the elements of the offense as of October 2, 1973. There was nothing further to be done, for Boaz stated that he obtained all of the guns from respondent, and there was an accounting for the guns allegedly stolen from the mail shipment. Thus, there was no difficulty in establishing the exact length of the pre-arrest delay. In *Hoffa*, however, there was a record of a continued investigation. Further, there was no concern in *Hoffa* with an arrest delay. In *Hoffa*, the squeeze was between the probable cause of the Fourth Amendment and the right to counsel of the Sixth. There was no concern with a speedy trial.[25]

Hoffa is, thus, distinguishable on the issue of Fifth Amendment due process, and the resultant prejudice to defendant's right to a fair trial.

3. The duty of the government to prosecute when it has probable cause to do so.

The government argues that there are difficulties inherent in a basically ad hoc approach to pre-accusation delay where there has not been prosecutorial

[25]Note, *Pre-Arrest Delay: Evolving Due Process Standards*, 43 New York Law Review 722, 727, 728 n. 33 (1968).

overreach, since there will be a need to ascertain at what point the government reasonably might be charged with having "delayed" formal accusation.

There is no problem here ascertaining the time which triggered the beginning of the delay.[26]

The record before the District Judge is brief, and spells out clearly that defendant on October 2, 1973, was the offender.[27]

It points out the respondent's offense was possession of stolen mail matter, to wit: eight Browning Arms handguns (D. Exh. A; A. 21, 22).

The government stipulated at the pre-trial hearing that the Postal Inspector recommended prosecution on the basis of the report submitted October 2, 1973, and that was the only evidence presented to the grand jury. The Postal Inspector supplied no supplemental material to the United States Attorney in written form other than Exhibit A.

The United States Attorney received information about a sale of a gun after the grand jury returned the indictment against respondent. This additional information obviously had nothing to do with the indictment against respondent, for the presentation of the matter to the grand jury had already been scheduled without this evidence.

The stipulation by the government also suggests that the United States Attorney believed he had probable cause to present the matter to the grand jury, for he says that the matter was scheduled for the grand jury without the additional information he acquired after the return of the indictment.

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[26]In *United States v. MacDonald*, 531 F.2d 196, 202 (4th Cir. 1976) the Appeals Court stated that the critical issue is the identification of the event and consequently the date, marking the beginning of the delay.

[27]This clearly registers respondent as an accused.

Rule 4, Federal Rules of Criminal Procedure, may be used as basis for this argument.

It provides:

> If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it.

Steinberg, *The Constitutional Right and its Application to the Speedy Trial Act of 1974*, 66 Journal of Criminal Law and Criminology 229 (1975) states on p. 238:

> In order to combat this problem, sufficient evidence must be defined as that amount of evidence necessary to establish that "there is *probable cause* to believe that an offense has been committed and that the defendant has committed it. . . ." Since probable cause is sufficient evidence for the state to arrest the prospective defendant, there is no adequate reason why the state should not be compelled to arrest and charge the defendant at that time. Defining sufficient evidence as evidence sufficient to show probable cause compels the state to prosecute at a more readily ascertainable time. At the same time, such a construction enables the defendant to adequately prepare his defense.

It is apparent thus that the decision as to whether a Fifth Amendment violation occurred must depend on an ad hoc approach to determine at what point the government had probable cause to compel the State to prosecute.

The District Court found that as of September 26, 1973, and in no event later than October 2, 1973, the government had all the information relating to

respondent's alleged commission of the offenses and the government did not explain or justify the delay.

Thus, the facts in this case readily and easily pinpoint the time at which the government had all the evidence for probable cause to prosecute respondent, and had the duty to do so.

The philosophy of the Justice Department to the Speedy Trial Act (18 U.S.C. §3161 *et seq.*) has relevancy to pre-indictment delay especially when the government can plead simple inertia as a cause, and it has been expressed by Justice Rehnquist while Assistant Attorney General in remarks to the Senate Subcommittee on Constitutional Rights in 1971:

> None of us interested in the administration of criminal justice, Mr. Chairman, whether inside or outside of the Government, whether within or without the bench and bar, can fail to be struck by the stark fact of intolerable delays in our system of administering criminal justice. The Department [of Justice] is of the view that some of the root causes of this unjustifiable delay must be sought out, identified, and dealt with, regardless of whether the solution for any particular facet of the problem tends to bear more heavily on one side of the criminal justice equation than the other. Therefore, we are unwilling to categorically oppose the mandatory dismissal provision. For it may well be, Mr. Chairman, that the whole system of Federal justice needs to be shaken by the scruff of its neck and brought up short with a relatively peremptory instruction to prosecutors, defense counsel and judges alike that criminal cases must be tried within a particular period of time. That is certainly the import of the mandatory dismissal provisions of your bill. (Senate Hearings, p. 96). 4 U.S. Code Congressional and Administrative News 7413, 7414 (93rd Congress, 2nd Session, 1974).

This Court held that under the Sixth Amendment: "A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis" (*Barker, supra,* at p. 530). *Barker* also identified some of the factors which Courts should assess in determining whether a particular defendant has been deprived of his rights. In *United States v. Marion, supra,* this same ad hoc treatment is supported when this Court stated, to accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case.[28] This Court in *Chambers v. Maroney*, 399 U.S. 42, 54 (1970) refused to fashion a per se rule that the government wants this Court to do here.

The government's argument that there will be insuperable problems by recording the various times of the various stages of the prosecution, must be weighed against the prejudice to a defendant's right to a fair trial. An ad hoc approach to pre-accusation delay is warranted and will ferret out prosecutorial abuse.

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[28]Judge Friendly in *Kyle v. United States,* 297 F.2d 507 (2nd Cir. 1961) stated as to due process on p. 514:

> The reason why the showing of prejudice required to bring down the balance in favor of a new trial will vary from case to case is that the pans contain weights and counterweights other than the interest in a perfect trial.

II

THE DISTRICT COURT SHOULD NOT RESERVE A RULING ON A DUE PROCESS CLAIM BASED UPON PRE-ACCUSATION DELAY AND PREJUDICE UNTIL AFTER TRIAL. FURTHER, THE GOVERNMENT FAILED TO REQUEST THE DISTRICT COURT TO RESERVE ITS RULING UNTIL AFTER TRIAL.

The government relies on Rule 12(e) Federal Rules of Criminal Procedure.[29]

The government claims that the pre-trial motion would be a dress rehearsal for the trial itself. The government goes on to say that the evidence introduced by the government at trial may establish the defendant's guilt so overwhelmingly that the loss to the defense of certain evidence is plainly harmless beyond a reasonable doubt. The government hypothesizes further that the defendant may still obtain an acquittal. The government also suggests that the defendant may be mistaken as to the government's theory of its case, and, therefore, the loss of the evidence was not material and therefore would not constitute prejudice based on the facts presented at trial.

Thus, the government seems to suggest that the government and the defendant will both benefit from a

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[29] Actually, the Rule was 12(b)(4) at the time of the pre-trial hearing on April 25, 1975, and on October 8, 1975, when the District Judge entered his Order. The rule change was effective December 1, 1975.

Rule 12(b)(4) Federal Rules of Criminal Procedure provides in part:

> Hearing on Motion. A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue.

determination of prejudice at the conclusion of trial.[30]

An analysis of the record here below supplies the best answer to the government's argument. The record below is brief. The issues at the pre-trial hearing were totally limited to the facts which established the delay and the resulting prejudice. Nothing was presented to prove the guilt of the defendant, and, therefore, the determination of the motion was clearly made without the trial of the general issue.[31]

The record reflects the investigation its conclusion, the prejudice to the defendant, and the subsequent indictment. The parameters of the pre-trial evidentiary hearing can be neatly drawn by the District Court within its discretion as was done here. The government's claim of a dress rehearsal for the trial has no basis in fact, and is merely designed to avoid facing its responsibility early. Actually, a reading of the record below reveals that it may have taken all of an hour.

Judicial economy would demand that a matter which can be disposed of within a few hours be resolved in that manner. A two hour pre-trial motion would release a crowded calender of the District Judge of the need for a protracted jury trial.

There are other considerations against waiting to the end of the trial.

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[30] Rule 12(b)(1) Federal Rules of Criminal Procedure, in effect April 25, 1975, provided:

> "any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion."

[31] The government wishes to extend this rule to a Sixth Amendment violation where there is minimal prejudice to the defendant. It is submitted that the standards under *Barker* for a Sixth Amendment violation should be examined by the District Court as well before trial. The same principles of judicial economy and a fair trial would dictate that this constitutional issue not await a jury verdict.

The defendant who may have small economic resources is relieved of the burden of counsel fees for a protracted jury trial, if his pre-trial motion is sustained.

Further, the judge is still called upon to make the decision as to the pre-accusation prejudice, and the jury verdict should not influence his judgment, although the government is hopeful that a verdict of guilty will be a strong influence on the District Judge to resolve the ruling on the motion in the government's favor.

The respondent's contention that this is a matter that should not await the outcome of the trial is supported by the House Committee on the Judiciary which stated the purpose of Rule 12:

> Further, the Committee hopes to discourage the tendency to reserve rulings on pretrial motions until after verdict in the hope that the jury's verdict will make a ruling unnecessary.[32]

It is to be noted that the government is asking the Court here for an advisory opinion on the issue of delaying the hearing on the Motion to Dismiss to the conclusion of the trial since this matter was never raised in the District Court or before the Appeals Court, and thus, there is an absence of a record to show an abuse of discretion by the District Judge.

In *Hughes v. Thompson*, 415 U.S. 1301, 1302, 1303 (1974), Mr. Justice Douglas noted 12(b)(4), in stating that it would be an extremely unusual case for an appellate judge to direct a district judge that he should exercise his discretion by postponing an arraignment until after the Motion to Dismiss the Indictment has been resolved.

This Court in *United States v. Covington*, 395 U.S. 57, 60 (1969) explained Rule 12(b)(1):

[32] 8 Moore's Federal Practice §12.01[3](12-12).

> A defense is thus "capable of determination" if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense.

The government has not supported its claim that the facts have to be tried in order to assist the Court in determining the validity of the Motion. It has merely conjectured this would have to occur, and the record below refutes this speculation.

In *United States v. Whitted*, 454 F.2d 642, 644 (8th Cir. 1972), the Appeals Court held that the rule (12b) requires the District Court to determine the motion before trial unless special circumstances exist.

In *United States v. Dooling*, 406 F.2d 192, 197 (2nd Cir. 1969), the Appeals Court discussed the purpose of the rule:

> The evident purpose of these two provisions of Rule 12(b) is to encourage the disposition before trial of as many motions as possible which challenge the right of the government to continue a prosecution. Obviously this practice is greatly preferable to considering such a motion only after the completion of a lengthy trial.

Further, in *United States v. De Diego*, 511 F.2d 818, 824 (D.C. Cir. 1975), the District Judge denied an evidentiary hearing prior to trial, and the Appeals Court held that a preliminary evidentiary pre-trial hearing lasting considerably less than several days could have been undertaken when the trial was not scheduled for four weeks.

The basic issue here is whether a jury trial with the loss of evidence by the death of a material witness can be fair. This decision must be made before trial, for the District Court must evaluate prior to trial whether the defendant should stand trial in view of his due process claim.

The Appeals Court affirmed the District Court's finding that respondent was prejudiced in his ability to defend against the charges. Respondent could not have a fair trial, and a trial under such a circumstance would be constitutionally infirm, and oppress a District Court with more unnecessary work and time in an already overburdened system.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be sustained.

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